

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Petition for Commission Assumption of) CC Docket No. 97-163
Jurisdiction of Low Tech Designs, Inc.'s)
Petition for Arbitration with Ameritech Illinois)
Before the Illinois Commerce Commission)

**OPPOSITION OF AMERITECH ILLINOIS TO
PETITION FOR COMMISSION ASSUMPTION OF JURISDICTION**

Illinois Bell Telephone Company ("Ameritech Illinois"), by its attorneys, hereby submits its response to the petition filed by Low Tech Designs, Inc. ("LTD") under 47 U.S.C. § 252(e)(5) ("Section 252(e)(5)") in the above-captioned proceeding. LTD's petition depends upon the proposition that the Illinois Commerce Commission ("ICC") "fail[ed] to act to carry out its responsibility", Section 252(e)(5), to conduct LTD's Section 252(b) arbitration with Ameritech Illinois. The ICC did no such thing. Rather, as it has done in all the other arbitrations that it has been called upon to conduct under the 1996 Act, the ICC fully discharged its responsibilities and issued an Arbitration Decision within the statutory time frame.

LTD is unhappy with the ICC's arbitration decision (just as it is unhappy with the similar decisions of the other State commissions on which it has pressed its claims), and so seeks review here. But the Communications Act of 1934, as amended (the "Act") does not provide for such review, either in Section 252(e)(5) or elsewhere. Because the ICC carried out its statutory responsibility in the LTD/Ameritech Illinois arbitration, the Commission cannot properly preempt the ICC's jurisdiction over the arbitration under Section 252(e)(5).

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I. Background

On January 30, 1997, LTD filed with the ICC a Petition for Arbitration, purportedly pursuant to Section 252(b) of the 1996 Act, to resolve open issues with Ameritech Illinois. In accordance with its established procedures the ICC opened a docket (97 AB-001) for the arbitration and appointed a Hearing Examiner. Again in accordance with established ICC procedure, the Hearing Examiner scheduled an initial pre-hearing conference for February 11, 1997. At that conference, the Hearing Examiner set a detailed schedule for the arbitration, including dates for discovery, submission of written testimony, an evidentiary hearing and post-hearing briefs.^{1/} Over the next ten days, the Hearing Examiner heard argument and ruled upon Ameritech Illinois' motion to strike one portion of LTD's arbitration petition and a motion to compel discovery.

On February 24, Ameritech Illinois timely filed its Response to LTD's arbitration petition, submitted the pre-filed testimony of three witnesses, and filed a Motion to Deny the Petition ("Motion"). The Motion urged the ICC to deny LTD's arbitration petition on two grounds: (1) that the petition sought arbitration of matters beyond the scope of the 1996 Act; and (2) that LTD was not a "telecommunications carrier" entitled to access or interconnection under the 1996 Act. LTD and the Staff of the ICC each filed a brief in response to the Motion (Staff supported the Motion and LTD opposed it), and Ameritech Illinois filed a reply. After considering the pre-filed testimony and briefs, the Hearing Examiner determined — consistent with Ameritech Illinois' Motion and with the position of

^{1/} See In the Matter of Low Tech Designs Inc., No. 97 AB-001 Transcript of Proceedings, pp. 1-12 (Feb. 11, 1997) attached hereto as Exhibit 1.

Staff — that LTD was not a “telecommunications carrier” under the 1996 Act, and therefore issued a Hearing Examiner’s Proposed Order (“HEPO”) recommending that the ICC dismiss LTD’s arbitration petition. LTD filed a brief on exceptions, which challenged the HEPO, and Ameritech Illinois filed a reply brief on exceptions, which supported the HEPO. Staff also filed a brief supporting the HEPO. On March 31, 1997, the ICC issued its Arbitration Decision denying the petition on the ground recommended by the Hearing Examiner,^{2/} namely, that LTD is not a “telecommunications carrier” under the 1996 Act.^{3/}

On July 11, 1997, LTD filed its Petition for Commission Assumption of Jurisdiction (“LTD Section 252(e) Petition”). LTD charges that the ICC failed to act to carry out its responsibility under Section 252(b) and requests that this Commission preempt the ICC and assume jurisdiction over the LTD/Ameritech Illinois arbitration pursuant to Section 252(e)(5).

^{2/} Arbitration Decision, Docket No. 97 AB-001, issued March 31, 1997 (Exhibit 2 hereto). Because the ICC dismissed LTD’s arbitration petition on the ground that LTD was not a “telecommunications carrier,” it did not rule on Ameritech Illinois’ second ground for denying the petition. Id., p. 7.

^{3/} Among other things, the ICC found that LTD had failed to demonstrate the “ability an entity must possess as a telecommunications carrier to give some measure of assurance that the consumers can rely on it to provide telecommunications services.” Arbitration Decision, p. 4. LTD is a Georgia corporation with its principal place of business in South Carolina. James M. Tennant appears to be LTD’s only officer or employee. LTD’s certificate of incorporation (Exhibit 3 hereto), states that LTD is organized for the purpose of “engag[ing] in the business of marketing and distributing leisure products and other related and non-related products”; “engag[ing] in any lawful business or activity relating thereto”; and “engag[ing] in any lawful act or activity for which a corporation may be organized under the Georgia Business Corporation Code.”

II. The ICC Fully Discharged Its Section 252 Duty

Section 252(e)(5) provides that “[i]f a State commission fails to act to carry out its responsibility” under Section 252 in “any proceeding or other matter under [Section 252],” the Commission shall “preempt[] the State commission’s jurisdiction” of the proceeding or matter and “shall assume the responsibility of the State commission . . . and act for the State commission.” The question here, then, is whether the ICC “fail[ed] to act to carry out its responsibility” with respect to the petition that LTD filed requesting arbitration with Ameritech Illinois.

This Commission’s implementing rules provide that “the party seeking preemption must prove that the state has failed to act to carry out its responsibilities under section 252 of the Act.” 47 C.F.R. § 51.803(b). The rules specify the two circumstances in which a State commission may be deemed to have “fail[ed] to act” for purposes of Section 252(e)(5):

a state commission fails to act if the state commission [1] fails to respond, within a reasonable time, to . . . a request for arbitration, as provided for in section 252(b) of the Act, or [2] fails to complete an arbitration within the time limits established in section 252(b)(4)(C) of the Act.

Id., § 51.801(b). As the Commission explained, it “will not take an expansive view of what constitutes a state’s ‘failure to act.’ Instead. . .[a] ‘failure to act’. . .mean[s] a state’s failure to complete its duties in a timely manner.” Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, 16128 (1996) (“Local Competition Order”).

LTD’s Section 252(e)(5) Petition fails to discuss (or even cite) the Commission’s rules, and for good reason: Under a straightforward application of those rules, LTD’s

charge that the ICC “fail[ed] to act to carry out its responsibility,” and its request that the Commission assume jurisdiction under Section 252(e)(5), is patently frivolous.

First, it is beyond dispute that the ICC responded “within a reasonable time” to LTD’s request for arbitration. 47 C.F.R. § 51.801(b). As explained above, LTD filed its Petition for Arbitration on January 30, 1997. The ICC established an arbitration docket (97 AB-001) and assigned a Hearing Examiner to the proceeding promptly upon receiving LTD’s petition for arbitration. At a pre-hearing conference held on February 11, less than two weeks after LTD filed its petition, the Hearing Examiner set forth a schedule for (1) the submission of pre-filed testimony by Ameritech Illinois, LTD and Staff; (2) the filing of discovery requests and responses thereto; (3) briefing the motion to dismiss that Ameritech Illinois stated it would file; (4) an evidentiary hearing; (5) post-hearing briefs and reply briefs; (6) the Hearing Examiner’s proposed arbitration decision; (7) briefs on exceptions to the Hearing Examiner’s proposed arbitration decision; and (8) the ICC’s final decision.^{4/} The Hearing Examiner proceeded to rule upon a motion to strike, ruled on a discovery dispute, took briefs on Ameritech Illinois’ motion to dismiss the arbitration, and issued a proposed arbitration decision. After taking briefs on exceptions to the Hearing Examiner’s proposed decision and reply briefs on exceptions, the ICC issued its final arbitration decision. In sum, the ICC conducted the LTD/Ameritech Illinois arbitration in accordance with pre-established procedures, and certainly “responded within a reasonable time” to LTD’s arbitration petition.

^{4/} See In the Matter of Low Tech Designs, Inc., No. 97 AB-001, Transcript of Proceedings, pp. 1-12 (Feb. 11, 1997) (Exhibit 1 hereto).

Second, the ICC completed the LTD/Ameritech Illinois arbitration “within the time limits established in section 252(b)(4)(C) of the Act.” 47 C.F.R. § 51.801(b). Section 252(b)(4)(C) provides that the state Commission shall conclude the arbitration “not later than 9 months after the date on which the local exchange carrier received the request under this section.” Ameritech Illinois received LTD’s request for interconnection on August 27, 1996 — making May 27, 1997 the ICC’s deadline for completing the arbitration.^{5/} The ICC issued its Arbitration Decision on March 31, 1997, approximately two months before the statutory deadline.

Given the foregoing, LTD has no plausible basis to assert that the ICC “fail[ed] to act to carry out its responsibility” with respect to LTD’s arbitration petition. Indeed, LTD devotes virtually no attention to the “failure to act” prerequisite in Section 252(e)(5) and this Commission’s implementing regulations. Rather, LTD focuses almost exclusively upon the merits of the ICC’s Arbitration Decision, arguing that it contravenes the 1996 Act and the Local Competition Order. See LTD Section 252(e)(5) Petition, pp. 3-5. LTD’s merits arguments are misplaced: Neither Section 252(e)(5) nor any other provision of the 1996 Act empowers the Commission to sit as an appellate body to review the merits of arbitration decisions rendered by State commissions that carry out their responsibilities under Section 252(b).^{6/}

^{5/} LTD Section 252(e)(5) Petition, ¶ 3.

^{6/} See, e.g., 47 U.S.C. § 252(e)(6).

CONCLUSION

The FCC has expressed its belief that states such as Illinois “will meet their responsibilities and obligations under the 1996 Act.”^{7/} As the FCC is surely aware, the ICC is among the leading state Commissions when it comes to promoting local telecommunications competition and implementing the 1996 Act. Since enactment of the 1996 Act, the ICC has completed seven Section 252(b) arbitrations, approved 21 interconnection agreements, and conducted an exhaustive examination of Ameritech Illinois’ compliance with Section 271(c). The ICC has fulfilled this Commission’s expectation that the ICC “will meet [its] responsibilities and obligations under the 1996 Act.” Id.

Given this record, LTD’s charge that the ICC abdicated its responsibilities under the Act so as to justify Commission preemption under Section 252(e)(5) must be viewed at the outset with skepticism.^{8/} And the facts set forth above provide absolute confirmation that the ICC acted as required to carry out its responsibility with respect to LTD’s arbitration petition.

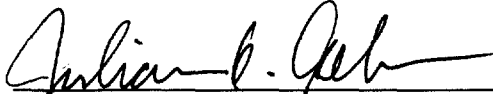
^{7/} Local Competition Order, 11 FCC Rcd at 16128.

^{8/} An additional threshold reason for skepticism is that both the Georgia and South Carolina commissions dismissed LTD’s arbitration petitions; LTD seeks Commission preemption under Section 252(e)(5) with respect to those proceedings as well. LTD Section 252(e)(5) Petition, p. 5.

For the foregoing reasons, the Commission should deny LTD's Petition for Commission Assumption of Jurisdiction.

Respectfully submitted,

**ILLINOIS BELL TELEPHONE
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Date: July 28, 1997

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EXHIBIT 1

BEFORE THE
ILLINOIS COMMERCE COMMISSION

IN THE MATTER OF:)

LOW TECH DESIGNS, INC.,)

) No. 97 AB-001

Petition for Arbitration)
pursuant to Section 252(b) of)
the Telecommunications Act of)
1996 to establish wholesale)
rates and an interconnection)
agreement for access to and)
rates for unbounded network)
elements with Illinois Bell)
Telephone Company d/b/a)
Ameritech Illinois.)

Chicago, Illinois
February 11, 1997

Met, pursuant to notice, at 10:00 a.m.

BEFORE:

MR. EDWARD WASHINGTON, Administrative Law
Judge

APPEARANCES:

MAYER, BROWN & PLATT, by
MR. DENNIS FRIEDMAN and
MR. GARY FEINERMAN
190 South LaSalle Street
Chicago, Illinois 60603
appearing for Ameritech Illinois;

ILLINOIS COMMERCE COMMISSION, by
MR. DARRYL REDD, MR. DAVID MCGANN, and
MR. CARMEN FOSCO,
160 North LaSalle Street,
Suite C-800,
Chicago, Illinois 60601
appearing for the Staff of the Illinois
Commerce Commission.

1 APPEARANCES CONT'D

2 MR. JAMES MARTIN TENNANT,
3 1204 Saville Street,
4 Georgetown, South Carolina,
5 appearing on behalf of Low Tech
6 Designs.
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20 SULLIVAN REPORTING COMPANY, by
21 Kristin C. Brodlo, CSR
22 License No. 084-003810

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I N D E X

Witnesses: Direct Cross direct cross Examiner

NONE.

E X H I B I T S
For Identification

In Evidence

NONE.

1 JUDGE WASHINGTON: Pursuant to the rules and
2 regulations of the Illinois Commerce Commission, I
3 now call the case of Low Tech Designs,
4 Incorporated, petition for arbitration pursuant to
5 Section 252(b) of the Telecommunications Act of
6 1996, case No. 97 AB-001.

7 Appearances for the record, please.

8 MR. FRIEDMAN: Representing Ameritech
9 Illinois, Dennis Friedman and Gary Feinerman,
10 Mayer, Brown & Platt, 190 South LaSalle Street,
11 Chicago 60603.

12 JUDGE WASHINGTON: Mr. Tennant.

13 MR. TENNANT: I am representing my company,
14 Low Tech Designs. My name is James Martin
15 Tennant. I am the president, and my address is
16 1204 Saville Street, Georgetown, South Carolina
17 29440.

18 MR. REED: Darryl Reed, Carmen Fosco, David
19 McGann, Office of General Counsel, 160 North
20 LaSalle, Suite C-800, Chicago 60601, on behalf of
21 the Staff of the Illinois Commerce Commission.

22 JUDGE WASHINGTON: Okay. We have had an

1 off-the-record discussion to set a schedule in
2 this case for hearing and briefing and then also
3 an additional schedule for a possible motion.

4 And then also I will rule on a
5 pending motion to strike portions of the petition
6 by Friday, February 14th.

7 As we have it in our discussion on
8 today, February 11th, Low Tech will serve
9 discovery on Ameritech. Is that correct?

10 MR. TENNANT: That is correct.

11 JUDGE WASHINGTON: On February 14th,
12 Ameritech will serve discovery on Low Tech.

13 On February 21st Low Tech will file
14 its verified statement in support of the
15 petition.

16 On February 24th Ameritech will
17 file its verified statement in support of its
18 response to the petition.

19 On March 4th Staff will serve
20 discovery on Low Tech and Ameritech.

21 On March 11th Low Tech and
22 Ameritech will respond to Staff's discovery.

1 On March 18th Staff will file its
2 verified statements in response to the petition.

3 On March 25th Low Tech and
4 Ameritech will serve discovery on Staff.

5 On April 1st Staff responds to the
6 discovery. And that is discovery served on
7 Staff?

8 MR. REED: Right.

9 JUDGE WASHINGTON: On April 8th Low Tech and
10 Ameritech will file their supplemental verified
11 statements, and on April 11th there will also be
12 simultaneous second verified statements to be
13 filed.

14 The hearing date is April 16th, and
15 we will just set it for -- excuse me --
16 April 14th, and we will set it for -- so that we
17 have the time reserved April 14th and 16th.
18 Although we realize that the 16th is a hold over
19 date, and we will cancel the 16th if we don't need
20 it.

21 April 22nd, the initial briefs will
22 be due.

1 April 29th, the reply briefs will
2 be due. The proposed order will be issued
3 April 6th -- I mean May 6th. I'm sorry.

4 May 9th, the briefs on exception
5 will be due, and we will try to get this order on
6 the Commission's May 20th agenda.

7 With respect to a -- if a motion to
8 dismiss is to be filed by Ameritech, that will be
9 filed on February 24th. LTD will have until
10 February 28th to file its response.

11 Ameritech will have until
12 March 4th to file a reply, and on March 7th, the
13 hearing examiner will issue a ruling on that
14 motion.

15 Now, the mode of service generally
16 will be -- well, primarily will be fax service
17 between the parties. If a document is voluminous,
18 we request that the serving party call the
19 receiving party and explain that to the receiving
20 party. And if the receiving party is
21 accommodating or desires it, the documents should
22 be sent overnight delivery. Are we clear on

1 that?

2 MR. REED: Yes sir.

3 JUDGE WASHINGTON: Now, any other preliminary
4 matters we need to add here.

5 MR. FRIEDMAN: Just one amendment for the
6 record on the schedule.

7 JUDGE WASHINGTON: Uh-huh.

8 MR. FRIEDMAN: On February 21st, Low Tech in
9 addition to filing verified statements also
10 responds to the discovery served by Ameritech one
11 week earlier?

12 JUDGE WASHINGTON: You got that,
13 Mr. Tennant?

14 MR. TENNANT: I guess I understand that.

15 JUDGE WASHINGTON: Okay.

16 MR. TENNANT: And Ameritech is supposed to
17 respond to my discovery by the 24th of February;
18 is that correct?

19 MR. FRIEDMAN: We will respond sooner than
20 that.

21 MR. TENNANT: Okay.

22 JUDGE WASHINGTON: Well, I guess since we

1 have got a date for Low Tech on the record to
2 respond, we probably need a date for Ameritech to
3 respond just to have it.

4 MR. FRIEDMAN: I thought we were going to get
5 away without a date after Mr. Reed kept saying he
6 was sure we would be timely.

7 JUDGE WASHINGTON: I am sure you will, but
8 you know, fair is fair.

9 MR. FRIEDMAN: Absolutely. May we take the
10 same one week that LTD is taking so that would be
11 the 18th?

12 JUDGE WASHINGTON: So February 18th?

13 MR. FRIEDMAN: Correct.

14 JUDGE WASHINGTON: February 18th, Ameritech's
15 responses to Low Tech's discovery will be due.

16 MR. TENNANT: Now, faxing of this information
17 does not relieve me or Ameritech from the
18 necessity of filing with the chief clerk via U.S.
19 mail; is that correct?

20 JUDGE WASHINGTON: That's correct.

21 MR. REED: However, Mr. Tennant, you might be
22 made aware that discovery is not required to be

1 filed with either the hearing examiner or the
2 chief clerk's office.

3 MR. TENNANT: Okay.

4 MR. REED: It is only your verified written
5 statements and your briefs and any responses to
6 any motions or things like that that are filed
7 that need be filed with the clerk's office and
8 copies sent to the hearing examiner as well as the
9 parties.

10 MR. TENNANT: So my response to their motion
11 to dismiss is a verified response?

12 MR. REED: No. The only verifications that
13 you must file, Mr. Tennant, are those relating to
14 your statements in support of your petition.

15 MR. TENNANT: Uh-huh.

16 MR. REED: Typically here you have to have a
17 notice of filing and a certificate of service in
18 Illinois.

19 MR. TENNANT: Okay.

20 MR. REED: With respect to pleadings of that
21 nature.

22 JUDGE WASHINGTON: But I think his question

1 is, Does that motion have to be filed with the
2 Commission.

3 MR. REED: Yes. Your response to the motion
4 has to be filed with the chief clerk's office.
5 That is correct.

6 MR. TENNANT: It just does not have to be
7 verified by a notary public.

8 MR. FRIEDMAN: If I may, I would think that,
9 you know, the motion will present a primarily
10 legal argument requiring no verification. The
11 motion may be supported by some factual material
12 which, I would think, if we submit it in the form
13 of an affidavit or statement, we would verify.
14 And I would think the same would be true for the
15 response.

16 JUDGE WASHINGTON: I would think just as in
17 the Code of Civil Procedure or a filing of a
18 lawsuit if there is a verified pleading filed, it
19 would require a like verified response which
20 should not be any additional burden. I mean.

21 MR. FRIEDMAN: For purposes of service, is
22 the fax number that you gave us before the one

1 that you want us to use throughout?

2 MR. TENNANT: The one that is on the petition
3 527-7783 is my fax number.

4 MR. FRIEDMAN: You want us to direct our
5 faxes just to you?

6 MR. TENNANT: That's correct.

7 MR. FRIEDMAN: Could you please put on your
8 cover sheet to us both my name Dennis Friedman and
9 Gary Feinerman, please.

10 MR. TENNANT: Yes.

11 MR. FEINERMAN: That is F-e-i-n-e-r-m-a-n.

12 MR. TENNANT: That is on your response.

13 MR. REED: Mr. Tennant, this is Darryl Reed.
14 My fax number is area code 312.

15 MR. TENNANT: Could you hold on one second.

16 MR. REED: Sure. 793-1556. And my voice is
17 312-793-2877.

18 MR. TENNANT: And it is Darrell,
19 D-a-r-r-e-l-l?

20 MR. REED: D-a-r-r-y-l.

21 MR. TENNANT: Y-l.

22 MR. REED: That's correct.

1 MR. TENNANT: And it is R-e-e-d.

2 MR. REED: That's correct.

3 MR. TENNANT: Okay, Darryl.

4 JUDGE WASHINGTON: I think you had some
5 additional things you wanted to state,
6 Mr. Friedman.

7 MR. FRIEDMAN: I do have to make a brief
8 statement on the record concerning Ameritech's
9 forthcoming response. I will try to be brief. We
10 have here a petition for arbitration on seven
11 issues relating primarily or exclusively to
12 advanced intelligent network.

13 The parties' negotiations have not
14 matured to the point where the parties have
15 exchanged proposed contracts, and in addition, the
16 parties have discussed few, if any, issues beyond
17 those that are set forth in the petition.

18 Therefore, when it comes time for
19 Ameritech to file its response, Ameritech will not
20 be in a position to identify issues in addition to
21 those set forth in the response -- I'm sorry -- in
22 the petition. Ameritech also will not be in the

1 position of submitting along with its response a
2 proposed contract simply because the parties
3 negotiations have not proceeded to that point. So
4 it appears that what we will have here is a
5 petition raising seven discrete issues and a
6 response raising no additional issues. Assuming
7 that we go ahead and have an arbitration and an
8 arbitration decision is issued by the Illinois
9 Commerce Commission, it is Ameritech's position
10 that the parties then either may or may not wind
11 up with a contract depending on their ability
12 together to arrive at agreement on provisions on
13 matters beyond those raised in LTD's petition.

14 In the event that the parties are
15 unable to agree on contract terms, Ameritech does
16 not take a position on what must then happen or
17 what may then happen under the act. It is
18 Ameritech's position, though, and if LTD disagrees
19 with this, now I think is the time to say so.
20 That if the parties are not able to agree on terms
21 and conditions that are not arbitrated and if all
22 they have is an arbitration decision, it would not

1 be proper, then, for LTD to ask for or for the
2 Illinois Commerce Commission to require Ameritech
3 to enter into a contract consisting only of
4 language on those seven issues because there are
5 additional matters that absolutely must be covered
6 in any contract.

7 So that concludes my statement.

8 JUDGE WASHINGTON: Mr. Tennant, any response
9 there.

10 MR. TENNANT: Well, let me get my thoughts
11 together on that.

12 JUDGE WASHINGTON: Sure.

13 MR. TENNANT: If Ameritech wishes to come to
14 a complete agreement to be submitted to the
15 Illinois Commerce Commission for approval that
16 includes all of the language that Ameritech wishes
17 to include to define the contractual relationship
18 between the two parties, then Ameritech has the
19 ability during this intervening period to work
20 with Low Tech Designs to identify those issues and
21 show a good faith effort to come to a negotiated
22 agreement.

1 I think that pretty much sums up my
2 opinions on this, and if we can't come to an
3 agreement on these things -- and I think we are
4 under requirements of the law to resolve the
5 arbitrated issues and have those approved by the
6 Illinois Commerce Commission, then the potential
7 exists possibly for negotiations to move forward
8 to take into consideration the issues that
9 Ameritech was not able to agree to or that Low
10 Tech Designs was not able to agree to and
11 potentially bring that either on a mediated or an
12 arbitrated request to the Illinois Commerce
13 Commission.

14 JUDGE WASHINGTON: Okay. Well, that is -- I
15 don't know where that gets us, but both of you
16 have your impressions on the record of what is
17 going on here.

18 Is there anything further that you
19 gentlemen would like to add to help us along
20 here? Okay.

21 I just have one question, and I
22 would like an agreement here. Can we agree that